Britannia Brands (M) Sdn Bhd v Low Lay Kiang

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO (MT-1)11–36 OF 2003
VERNON ONG JC
4 AUGUST 2009

Contract — Terms — Implied terms — Whether age of retirement can be implied into an oral contract of employment — Intention of parties — Test in Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 — Whether evidence of past practice could be received under s 92(e) of the Evidence Act 1950 where there was no written contract

Labour Law — Employment — Employees — Compulsory retirement — No compulsory retirement clause in contract of employment — Whether employee entitled to termination benefits

Labour Law — Employment — Retirement — Age of — No written contract of service — Whether retirement age could be implied as 55 years

Labour Law — Employment — Termination benefits — Application for — Compulsory retirement of employee — Compulsory retirement not provided for in contract of employment — Whether employee entitled to termination benefits — Employment (Termination and Lay-Off Benefits) Regulations 1980 reg 4

The respondent began working with the appellant as a van driver on 16 May 1975. The contract of employment between the appellant and the respondent was not reduced into writing. The only documentary evidence was an undated document called 'Employment Record' ('D1') on the respondent created and kept by the appellant. The appellant terminated the respondent's employment on 14 June 2000 on the ground that the respondent had attained the age of retirement. No termination benefits were given. The respondent lodged a complaint at the labour office for termination benefits. Upon inquiry, the Assistant Director of Labour ('ADL') ordered the appellant to pay to the respondent termination benefits of RM18,410.96. The ADL allowed the respondent's claim on the grounds that: (i) there was no express provision on the retirement age of 55 years; (ii) the respondent was not expressly informed of the retirement age; (iii) the appellant never made any written amendments to the contract of service by including the retirement

age; and (iv) the respondent's case was the first case in which the appellant did not pay termination benefits to an employee who retired at the age of 55 years. The appellant appealed against the decision of the ADL on the grounds that: (a) the ADL erred in law in failing to appreciate that it was an implied term in the contract of employment that the retirement age was 55 years; and (b) the ADL failed to take into account s 2 of the Employment Act 1955 ('the Act') and wrongly interpreted reg 4(1)(a) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations').

Held, dismissing the appeal with costs:

(1) No letter of appointment was ever issued to the respondent. D1 contained the terms and conditions of employment but there was no provision on the retirement age. The implied term on retirement age was not a factor. Even without the implied term the contract of service had been performed with business efficacy throughout the respondent's employment period. The retirement age of 55 years only became an issue when the respondent was approaching his 55th birthday. In the circumstances it could not be said that the retirement age of 55 years was an implied term of the kind that will give business efficacy to the transaction of the contract of service (see paras 16–18).

(2) The retirement age was not something that was so obvious that it ought to have been provided for in the contract of service at the time when the respondent was appointed by the appellant (see paras 17 & 19); *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 followed.

(3) In the absence of a written contract of service the appellant's evidence of the so-called practice could not be implied under proviso (e) of s 92 of the Evidence Act 1950. Therefore, the court could not infer the implied term on the retirement age as contended by the appellant (see paras 21–22).

(4) The exception in para (a) of reg 4(1) only applies 'if the contract of service contains a stipulation' on the age of retirement. The word 'stipulation' in para (a) would include terms which are oral or in writing and whether express or implied. In view of the finding that the retirement age was not an implied term in the contract of service, the exception in para (a) could not be invoked to defeat the respondent's claim (see paras 26–29).

[Bahasa Malaysia summary

Responden mula bekerja dengan perayu sebagai pemandu van pada 16 Mei

1975. Kontrak pekerjaan di antara perayu dan responden tidak dibuat secara bertulis. Satu-satunya keterangan dokumentar ialah dokumen tidak bertarikh dikenali sebagai 'Employment Record' ('D1') ke atas responden yang dibuat dan disimpan oleh perayu. Perayu memberhentikan responden pada 14 Jun 2000 atas alasan bahawa responden sudah mencapai umur persaraan. Tiada faedah-faedah pemberhentian diberikan. Responden membuat aduan di pejabat buruh untuk faedah-faedah pemberhentian. Semasa siasatan, Penolong Pengarah Tenaga Kerja ('PPTK') mengarahkan perayu untuk membayar faedah-faedah RM18,410.96 kepada responden. PPTK membenarkan tuntutan responden atas alasan bahwa: (i) tidak terdapat peruntukan tersurat mengenai umur persaraan 55 tahun; (ii) responden tidak dimaklumkan secara langsung mengenai umur persaraan; (iii) perayu tidak pernah membuat apa-apa pindaan bertulis kepada kontrak perkhidmatan dengan memasukkan umur persaraan; dan (iv) kes responden merupakan kes pertama yang mana perayu tidak membayar faedah-faedah pemberhentian kepada pekerja yang bersara pada usia 55 tahun. Perayu merayu terhadap keputusan PPTK atas alasan bahawa: (a) PPTK khilaf dari segi undang-undang apabila ia gagal mempertimbangkan bahawa adalah terma tersirat dalam kontrak pekerjaan bahawa umur persaraan ialah 55 tahun; dan (b) PPTK gagal untuk mengambilkira s 2 Akta Pekerjaan 1955 ('Akta') dan tersilap mentafsir peraturan 4(1)(a) Peraturan-Peraturan Kerja (Faedah-Faedah Penamatan dan Rentikerja Sentara) 1980 ('Peraturan-Peraturan').

Diputuskan, menolak rayuan dengan kos:

(1) Tiada surat pelantikan diberikan kepada responden. D1 mengandungi terma-terma dan syarat-syarat pekerjaan tetapi tiada peruntukan mengenai umur persaraan. Terma tersirat mengenai umur persaraan bukanlah satu faktor. Meskipun tanpa terma tersirat, kontrak perkhidmatan telah dijalankan dengan manjur sepanjang tempoh pekerjaan responden. Umur persaraan 55 tahun hanya menjadi satu isu apabila hari lahir responden ke 55 menjelang tiba. Dalam keadaan tersebut, umur persaraan 55 tahun tidak boleh dikatakan sebagai terma tersirat yang memberikan kemanjuran perniagaan kepada transaksi kontrak perkhidmatan (lihat perenggan 16–18).

(2) Umur persaraan bukanlah sesuatu yang sangat jelas dan ia perlu dinyatakan dalam kontrak perkhidmatan semasa responden dilantik oleh perayu (lihat perenggan 17 & 19); *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, diikut.

(3) Dalam ketiadaan kontrak perkhidmatan bertulis, keterangan perayu mengenai praktis yang dilakukan bukanlah tersirat di bawah syarat (e) s 92 Akta Keterangan 1950. Oleh itu, mahkamah tidak boleh membuat

A inferens mengenai terma tersirat umur persaraan sepertimana yang dihujah oleh perayu (lihat perenggan 21–22).

(4) Pengecualian dalam perenggan (a) peraturan 4(1) hanya terpakai 'if the contract of service contains a stipulation' ke atas umur persaraan. Perkataan 'stipulation' dalam perenggan (a) termasuk terma-terma lisan atau bertulis dan sama ada tersurat atau tersirat. Berpandukan dapatan bahawa umur persaraan bukanlah terma tersirat dalam kontrak perkhidmatan, pengecualian dalam perenggan (a) tidak boleh digunakan untuk mengecewakan tuntutan responden (lihat perenggan 26–28).]

Notes

For cases on employees, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 962–967.

For cases on implied terms, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5305–5355.

For cases on retirement, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1104–1105.

For cases on termination benefits, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1146–1157.

Cases referred to

Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal [2001] 4 MLJ 97; [1998] 3 ILR 843, CA (refd)

Estet Pekebun Kecil Sdn Bhd v Thomas Rajan [1991] 2 ILR 1028, HC (refd)

Liverpool City Council v Irwin & Anor [1977] AC 239, HL (refd)

London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd [1958] 1 WLR 661, CA (refd)

Malakoff Bhd v Kuppusamy & Ors [1991] 1 MLJ 39, HC (refd)

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai Kg Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)

NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39, SC (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (folld)

Sime Surveillance Sdn Bhd v Abu Bakar Hj Mahmood (Rayuan Sivil No R2–16–9 Tahun 1999) (refd)

Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581, FC (refd)

Syarikat Emastulin Automobil Sdn Bhd v Kathereson a/l Subramaniam [1988] 1 ILR 311 (refd)

Syarikat Maltaco Sdn Bhd v Eow Teh Yu & Ors [1985] 2 MLJ 19, SC (refd)

Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)

Yap Nyo Nyok v Bath Pharmacy Sdn Bhd [1993] 2 MLJ 250, HC (refd)

Legislation referred to

Employment Act 1955 ss 2, 69, 77
Employment (Termination and Lay-Off Benefits) Regulations 1980 reg 4(1), (1)(a)
Evidence Act 1950 s 92(e)
Sale of Goods Act 1957
Subordinate Courts Rules 1980 O 49 r 2

E Reena (Shearn Delamore & Co) for the appellant.
HK Tan (HK Tan & Co) for the respondent.

Vernon Ong JC:

[1] Britannia Brands (M) Sdn Bhd the appellant herein is dissatisfied with the decision of the assistant director of labour ordering the appellant to pay termination benefits of RM20,135 to Low Lay Kiang ('the respondent').

BRIEF ACCOUNT OF THE FACTS

[2] The respondent began working with the appellant as a van driver on 16 May 1975. In 1975 the appellant was known as Thye Hong Food Industries Sdn Bhd, and later as Nabisco Sdn Bhd. It is presently known as Britannia Brands (M) Sdn Bhd. The contract of employment between the appellant and the respondent was not reduced into writing. The only documentary evidence is an undated document called 'employment record' on the respondent created and kept by the appellant. On 15 May 2000 the respondent received a letter from the appellant terminating his employment on 14 June 2000 on the ground that the respondent had attained the age of retirement. During the notice period the respondent asked for his termination benefits and was told to wait for the appellant's decision. On 3 July 2000 the respondent wrote to the appellant for his termination benefits. Sometime in April 2001 the appellant's human resource manager informed the respondent of the appellant's decision not to pay him any money. On 19 April 2001 the respondent lodged a compliant at the labour office, Johore Bahru for termination benefits. After the hearing of the inquiry on 3 July 2002 the ADL made an order ordering the appellant to pay to the respondent termination benefits of RM18,410.96 together with interest.

THE LAW ON APPEAL UNDER S 77 OF THE EMPLOYMENT ACT 1955

[3] The decision of the ADL was made at the conclusion of the hearing of an inquiry pursuant to s 69 of the Act. The appellant being dissatisfied with the said decision appealed to the High Court under s 77 of the Act. The

procedure of appeal shall be the procedure in a civil appeal from a sessions court as prescribed by O 49 r 2 of the Subordinate Courts Rules 1980 (see *Syarikat Maltaco Sdn Bhd v Eow Teh Yu & Ors* [1985] 2 MLJ 19 (SC)). The appeal is by way of re-hearing.

INQUIRY PROCEEDINGS BEFORE THE ADL

[4] At the inquiry before Ruzita bt Bahari ('the ADL') the appellant was represented by Raymond TC Low and the respondent was represented by KH Tan. In support of his claim the respondent gave evidence and called six ex-colleagues as his witnesses. They were Lee Nguang Hiong ('CLW2'), Ronah bt Abdullah ('CLW3'), Tahir Hj Rahim ('CLW4'), Saw Ah Bah ('CLW5'), Koo Jee Song ('CLW6') and Ong Khon Kee ('CLW7'). The appellant's assistant human resources manager Anthony Liew Ah Fatt ('COW1') also gave evidence. The hearing commenced on 21 February 2002 and was adjourned after the respondent had given evidence. On 28 March 2002 CLW2, CLW3, CLW4, CLW5 and CLW6 gave evidence. On 29 March 2002 CLW7 gave evidence followed by COW1. The hearing continued on 3 May 2002 with COW1 giving evidence under cross-examination and re-examination. After all the evidence were recorded the ADL directed the parties to file written submission. On 3 July 2002 the ADL made an order ordering the appellant to pay termination benefits of RM18,410.96 together with interest.

THE APPELLANT'S CONTENTION

[5] Learned counsel for the appellant submitted on the following issues:

(a) the ADL erred in law in failing to appreciate that it was an implied term in the contract of employment that the retirement age was 55 years; and

(b) the ADL failed to take into account s 2 of the Employment Act 1955 ('the Act') and wrongly interpreted reg 4(1)(a) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations').

Whether the ADL erred in law in failing to appreciate that the retirement age was 55 years was an implied term in the contract of employment

[6] Learned counsel for the appellant submitted the respondent's claim for termination benefits is made under reg 4(1) of the Regulations. It was contended that under reg 4(1)(a) of the Regulations the respondent is not entitled to termination benefits. Even though the respondent was not issued a letter of appointment the terms and conditions of his employment (such as salary, hours of work, annual leave, sick leave) were informed verbally by the

appellant. The respondent's appointment was based on an oral contract. COW1 said that it has been a consistent practice of the appellant company that all employees retire at the age of 55 years. COW1 said that there were two categories of employees in the company. The first category of workers came under the scope of the collective agreement where the retirement age is 55 years. The non-unionised employees constituted the second category. The respondent belongs to the second category. In this category the retirement age is also 55 years even though almost all of the employees did not receive letters of appointment. Even so, the letters of appointment issued to the other employees under the second category did not state the retirement age.

[7] In support of his contention COW1 produced a list of names of employees who purportedly 'retired' at 55 years of age since 1994. The names on the list included CLW2, CLW3, CLW4, CLW5, CLW6 and CLW7. Of the 15 employees who retired at 55 years of age, ten were not issued any letters of appointment. The remaining five employees received letters of appointment which did not state the retirement age. COW1 said that the respondent's retirement age is 55 years. When the respondent received the letter of 15 May 2000 he did not object to it. The respondent, however, wrote a letter of acknowledgement and stated that he would be going to the appellant's office to receive his retirement benefit.

[8] It was also submitted that in his evidence the respondent accepted and all along knew about the appellant's practice and policy on the retirement age. Therefore, the ADL failed to take into account the fact that the respondent was at all material times aware of the retirement age and that the respondent did not object to it. Furthermore, the ADL had failed to consider the evidence showing that other employees has retired at 55 years of age. The evidence of all of the respondent's witnesses also show that they knew of the company's practice and policy on the retirement age.

FINDINGS OF THE COURT

[9] The ADL found that the terms and conditions of employment are contained in the 'employment record' (exh D1) which does not contain any provision on the retirement age. From the evidence adduced by the respondent and his witnesses the ADL found that there is no limit to the retirement age in D1. Notwithstanding the aforesaid, the appellant had fixed the retirement age at 55 years. There were employees who retired at the age of 55 years and other employees who retired earlier with the company's permission and received termination benefits. These included Ronah bt Abdullah ('CLW3') and Tahir bin Hj Rahim ('CLW4'). The ADL allowed the respondent's claim on the following grounds:

A (a) there was no express provision on the retirement age of 55 years;

(b) the respondent was not expressly informed of the retirement age;

(c) the appellant never made any written amendments to the contract of service by including the retirement age with the agreement of the
B employee; and

(d) the respondent's case is the first case in which the appellant did not pay termination benefits to an employee who retired at the age of 55 years.

C **[10]** From the notes of evidence of the inquiry it is clear that non-unionised employees who were asked to retire on their 55th birthday received termination benefits. This was still the practice when COW1 joined the appellant company in 1999. COW1 continued this practice when Ronah bt Abdullah who retired also received termination benefits in September
D 1999. In fact COW1's evidence only touched on the appellant's policy on retirement age after he joined the company. Other than saying that it was company practice COW1 did not have any personal knowledge of the so-called practice and policy. There was no documentary evidence to show that the practice or policy had been in force.

E

[11] Whether a term is implied into a contract falls to be determined by reference to the two tests laid down by the Federal Court in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151. At p 169 Peh Swee Chin FCJ described three types of implied terms which may be
F summarised as follows:

(a) where the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out therein;

G (b) by operation of law, from ratios decidendi adopted by courts in subsequent cases on similar facts as a matter of course without the necessity for any court to decide afresh whether to draw the inference eg in a contract of employment, there is an implied term that an employee will serve his employer faithfully, and not to act against the
H employer's interest; and that the employer will provide a safe system of work. Many of such decisions on specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; and

I (c) by custom or usage of any market or trade which is reasonable, eg under s 92(e) of the Evidence Act 1950.

[12] For the first type of the implied term, two tests must be satisfied before a court infers an implied term. His Lordship described the two tests as follows: A

(a) the subjective test, 'something so obvious that it goes without saying so that, if, while the parties were making the bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh of course': per MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at p 22; and B

(b) the implied term should be of the kind that will give business efficacy to the transaction of the contract of both parties and 'can be predicated that it goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended' per Lord Wright in *Luxor (Eastbourne) Ltd (in liquidation) & Ors v Cooper* [1941] AC 108. C D

[13] It is then clear that an implied term is a matter of necessity and that the element of 'business efficacy' is inseparable (see *Liverpool City Council v Irwin & Anor* [1977] AC 239; *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250). E

[14] Although there is in principle no difference between the test for implying terms into a contract of service and other agreements, certain standard terms have emerged over time. This development came about due to the essentially similar nature of all relationships between employee and employer and the fact that there is a clear divergence between the interests of an employee and an employer. For example, it is normally implied in a contract of service that an employee is under a duty to perform his work with reasonable competence or skill, to exercise reasonable care in the performance of his duties, to obey the lawful and reasonable orders of his employer, to serve his employer with fidelity and in good faith, and not to disclose any confidential information which he learns by reason of his employment. On the other hand, it is an implied obligation on the part of the employer that he would not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. F G H

[15] In the present case no letter of appointment was issued to the respondent when he was appointed by the appellant. In fact no letter of appointment was ever issued to the respondent. However, it is not disputed that the appellant kept a record on the respondent's employment described as 'Employment Record' ('D1'). What are the contents of D1? D1 contains sub-headings and they are: (1) personal details; (2) terms andconditions of I

employment; (3) previous working experience; (4) career details in Thye Hong; and (5) other benefits. It is pertinent to note the contents under the sub-heading 'Terms & Conditions of Employment' which are reproduced below:

> Basic Salary: $370 per month
>
> Allowance Payable: Special Relief Allowance $55 per month.
>
> Rate for Overtime Work: 1 1/2 times of ordinary rate of pay.
>
> Other Benefits: See Behind.
>
> Hours of Work per day: 8 hours.
>
> Agreed period of notice for termination of employment: one month.
>
> Entitlement of Public Holidays: 12 days per year.
>
> Entitlement of Annual Leave: 1 to 2 years = 8 days; 3 to 4 years = 12 days; 5 to 8 years = 16 days; 9 years & above = 18 days.
>
> Date of Payment of Salary: 1st week of the following month.

[16] For completeness, the 'other benefits' referred to consisted of:

(a) annual bonus payment at discretion of company;

(b) paid married leave three days;

(c) paid compassionate leave two days per application; and

(d) paid sick leave: 1 to 3 years = 14 days; 3 to 5 years = 18 days; 5 years and above = 22 days; or 60 days hospitalisation leave.

[17] It is quite clear that D1 is not merely an employment record created and kept by the appellant. In fact it is also the only document containing the terms and conditions of employment of the respondent. D1 contains the terms and conditions of employment but there is no provision on the retirement age. In the circumstances can it be said that the retirement age of 55 years is implied in the contract of service? The implication of a term relates back to the time of the negotiations. There was nothing to show that at the time of the negotiations the issue of retirement age must necessarily have been in the minds of both the appellant and the respondent. As such the retirement age is not something that is so obvious that it ought to have been provided for in the contract of service at the time when the respondent was appointed by the appellant.

[18] It is also evident that from the time of his appointment in 1975 up to the date of 'retirement' in 2000 the respondent served the appellant faithfully

and diligently for a period of 25 years. The implied term on retirement age was not a factor. Even without the implied term the contract of service has been performed with business efficacy throughout the said period. The retirement age of 55 years only became an issue when the respondent was approaching his 55th birthday. In the circumstances it cannot be said that the retirement age of 55 years is an implied term of the kind that will give business efficacy to the transaction of the contract of service.

[19] Applying the two tests enunciated by the Federal Court in *Sababumi*, the court finds that the retirement age is not something that is so obvious that it ought to have been provided for in the contract of service at the material time when the respondent was appointed by the appellant. The court also finds that the implied term is not of the kind that will give business efficacy to the transaction of the contract of service.

[20] It is also contended by the appellant that the procedure to retire employees at the age of 55 years has become accepted practice. In law, the so-called practice is referred to as trade usage or custom. The so-called practice may possibly form part of the contract of service although not expressly incorporated in the employment record D1. The incorporation of custom or trade usage is, however, subject to well defined principles of law. It must also be reasonable and not inconsistent with the terms and tenor of the contract of service as a whole. Jenkins LJ in *London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 661 said at p 675:

> I do not think there are any other authorities to which I can usefully refer. It appears to me, when all have been looked at, that the relevant principle of law cannot be stated with any greater precision than this: that an alleged custom can only be incorporated into a contract if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further, that a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole.

[21] Consistent with the above principles, oral evidence is admissible to establish a trade usage or custom to be annexed to a written contract under proviso (e) of s 92 of the Evidence Act 1950. Can the alleged practice be annexed to the contract of service? Proviso (e) refers to the annexation of a term implied by custom or trade usage to a written contract. In 1975 no letter of appointment was issued to the respondent by the appellant when the respondent was first employed. No letter of appointment or other written contract of service was issued to the respondent throughout the respondent's period of service. Apart from the fact of the respondent discharging his duties and receiving his salaries the only written evidence of his employment is the undated employment record D1. D1 is only an employment record kept by the appellant. The appellant did not furnish the respondent with a copy of

D1. In the absence of a written contract of service COW1's evidence of the so-called practice cannot be implied under proviso (e) of s 92 of the Evidence Act 1950.

[22] For the foregoing reasons, the court will not infer the implied term on the retirement age as contended by the appellant. Accordingly the question is answered in the negative.

Whether the ADL failed to consider s 2 of the Employment Act 1955 and misinterpreted reg 4(1)(a) of the Employment (Termination and Lay-Off Benefits) Regulations 1980

[23] At the outset it is necessary to set out reg 4(1) of the Regulations and the definition of 'contract of service' in s 2 of the Act.

Section 2 of the Act

'contract of service' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other person agrees to serve his employer as an employee and includes an apprenticeship contract;

Regulation 4 of the Regulations

4 Termination

(1) Subject to paragraphs (2), (3) and (4), an employee shall be entitled to termination benefits payment where his contract of service is terminated for any reason whatsoever otherwise than —

(a) by the employer, upon the employee attaining the age of retirement *if the contract of service contains a stipulation in that behalf*; or

(b) by the employer, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry; or

(c) voluntarily by the employee, other than under section 13(2) or for the reasons specified in section 14(3) of the Act.

(Emphasis added.)

[24] Learned counsel for the appellant submitted that according to s 2 of the Act a contract of service may be express or implied. This means that the age of retirement may be an implied term of the contract of service. Taking para (a) of reg 4(1) together with s 2 of the Act, learned counsel submitted

that the respondent is not entitled to any termination benefits if one of the implied terms of his contract of employment includes the age of retirement. In this case the respondent is not entitled to termination benefits as the retirement age of 55 years is implied due to the appellant's practice and company policy.

[25] In essence the appellant's main plank is the existence of a practice and company policy relating to the retirement age of its non-unionised employees. Regulation 4(1)(a) of the Regulations should be read together with s 2 of the Act. There is an implied term in the contract of employment that the retirement age is 55 years (*Sime Surveillance Sdn Bhd v Abu Bakar Haji Mahmood* (Rayuan Sivil No R2–16–9 Tahun 1999)). The respondent had not challenged or questioned the retirement age of 55 years practised by the appellant. As such the appellant's practice and policy had become customary and falls to be implied into the respondent's contract of employment (*Syarikat Emastulin Automobil Sdn Bhd v Kathereson a/l Subramaniam* [1988] 1 ILR 311; *Estet Pekebun Kecil Sdn Bhd v Thomas Rajan* [1991] 2 ILR 1028; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [1998] 3 ILR 843; *Harvey on Industrial Relations and Employment Law* at p A/103). Accordingly the respondent fell within the exception of para (a) of reg 4(1). It was submitted that the case of *Malakoff Bhd v Kuppusamy & Ors* [1991] 1 MLJ 39 can be distinguished on the facts. The ADL erred in allowing the respondent's claim for termination benefits because there was no express provision on retirement age in the employment record (D1). The ADL also erred in ruling that it is not possible to imply an implied term on retirement age.

FINDINGS OF THE COURT

[26] The exception in para (a) of reg 4(1) only applies 'if the contract of service contains a stipulation' on the age of retirement. It is the appellant's contention that as para (a) should be read together with s 2 of the Act, the respondent is not entitled to termination benefits. In construing a statute the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself (see *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 (SC); *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai Kg Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 (FC); *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 (SC); *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581 (FC)).

[27] In this regard the operative word is 'stipulation'. The *Oxford Advanced Learner Dictionary* (2nd Ed) defines the word 'stipulate' as 'to state exactly

how something must be or must be done'. The word 'stipulation' is defined as 'when someone says exactly how exactly something must be done'. Learned counsel for the respondent referred to the *Shorter Oxford English Dictionary* which defines (i) 'stipulate' as 'make a contract, bargain, or covenant (with a person). Specify or demand, esp as an essential part or condition of an agreement, contract, offer, etc ...; make an explicit demand for something as a condition of agreement'; and (ii) 'stipulation' as 'an undertaking to do something. A contract, an agreement, a treaty'. Learned counsel submitted that notwithstanding the words 'whether express or implied' in s 2, the word 'stipulation' in para (a) of reg 4(1) only applies to what is express in the contract of service. The word 'stipulation' in para (a) of reg 4(1) must be read in conjunction with s 2 of the Act. Regulation 4(1) clearly refers to a contract of service. The words 'contract of service' is defined in s 2 to mean any agreement, whether oral or in writing and whether express or implied. The Regulations is a piece of subsidiary legislation enacted pursuant to the Act. The words 'contract of service' appearing in para (a) must be read conjunctively with s 2 so as to give consistency and efficacy to the application of the Regulations. Accordingly, the word 'stipulation' in para (a) would include terms which are oral or in writing and whether express or implied.

[28] Reverting to the appellant's contention that the ADL failed to consider s 2 of the Act and erred in ruling that it is not possible to imply an implied term on retirement age. According to the records the ADL rejected the appellant's contention that the retirement age was an implied term by reference to para (a) of reg 4(1). The ADL made a finding that the retirement age was not a stipulation in the contract of service. With respect, the ADL did not rule that it is not possible to imply such a term. Therefore, the ADL did not make any error in ruling that is it not possible to imply an implied term on retirement age. Even if the ADL had made the ruling as contended by the appellant, in view of the finding that on the facts the retirement age is not an implied term in the contract of service, the exception in para (a) could not be invoked to defeat the respondent's claim.

[29] For the foregoing reasons the appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum